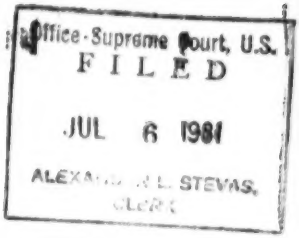
81-33



NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DAVID M. WOLLMAN, PETITIONER

V.

JAKE GROSS, JR, RESPONDENT

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

* *

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

* *

John N. Gridley, III
101 S. Main
Suite 402
Sioux Falls, SD 57102

(605)-339-1748

N. Dean Nasser, Jr.
101 S. Main
Suite 404
Sioux Falls, SD 57102

(605)-335-0001

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the conduct of the Government and of its employee, the negligent tortfeasor, in failing to report an F.T.C.A. automobile claim to the employee's superiors (as required by the ASCS Regulations and 28 C.F.R. 15.1) and in further causing the plaintiff to deal exclusively with the employee tortfeasor's private insurance carrier resulting, through plaintiff's blameless ignorance, in the plaintiff's failing to discover than an F.T.C.A. claim was available until more than two years of the date of the injury, operates to postpone the accrual of the cause of action (thusly extending the time for filing the F.T.C.A. claim) until the plaintiff is first reasonably able to discover the "critical fact" that the United States was a possible defendant.

II.

Whether when through a plaintiff's blameless ignorance of a defendant tortfeasor's role as a federal employee (acting within the scope of employment at the time of the accident) suit is commenced in state court (instead of filing an F.T.C.A. claim with an administrative agency) the commencement of the state court lawsuit operates as the administrative filing.

III.

Whether the United States in substituting itself in the place of an F.T.C.A. defendant employee (who has failed to properly report the F.T.C.A. claim to his federal superiors) becomes entitled to assert the statute of limitations when the defendant employee himself would be deemed to have waived it.

LIST OF ALL PARTIES TO THE PROCEEDING

1. David M. Wollman Plaintiff and Petitioner
2. Jake Gross, Jr., Defendant (Federal Employee
3. United States of America, Substituted Defendant
4. Western Casualty and Surety Company, Fort Scott, Kansas, (the private insurer of Jake Gross, Jr.) appearing by permission of the district court through Timothy J. Nimick, Attorney at Law, Sioux Falls, South Dakota. While the private insurer is technically not a named party, its interest was acknowledged by the district court and Mr. Nimick was given standing to appear in the courts below.

TABLE OF CONTENTS

Questions Presented For Review. . . . . (i)

Table of Contents . . . . . .(1a)

Table of Authorities. . . . . .(1b)

List of All Parties to the Proceeding. 1

Reference to the Official and Unofficial Reports of Opinions Delivered in the Courts 2

Grounds Upon Which the Jurisdiction of the Supreme Court is Invoked 3

The Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Which the Instant Case Involves 4

Statement of the Case 5

I. Procedural History (Showing Jurisdiction in District Court). . . . 5

II. Facts. 7

Reasons for Granting the Writ 14

1. The United States Court of Appeals for the Eighth Circuit in its Decision in the Instant Case has Directly Conflicted with Kelley vs. The United States 568 F.2d 259, (2d Cir. 1978) on Exactly the Same Issue 14

2. The Decision in the Instant Case is in Conflict with Kelly, supra., (Second Circuit), United States vs. LePatourel, 593 F.2d 827 (8th Cir. 1979) (en banc) and United States vs. Kubrick 444 U.S. 111 (1979) 17

3. The United States has Waived the Statute of Limitations Objection in the Instant Case. 22

Conclusion. 22

Signature 24

TABLE OF AUTHORITIES

Cases:

Kelley vs. The United States, 568 F.2d 259, (2d Cir. 1978). 14,15, 16,17

Meeker vs. United States, 435 F.2d 1219 (8th Cir. 1970) 15

United States vs. Kubrick, 444 U.S. 111 (1979) 17,18 20,21,22

United States vs. LePatourel, 593 F.2d 827 (8th Cir. 1979) (en banc). . . 17,21

Statutes:

28 U.S.C. 1346(b) 5

28 U.S.C. 2679. 16,22

Regulations:

28 C.F.R. 15.1(a) 9,16

A.S.C.S. Regulations. 9

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW :

The decision of the district court for the Southern District of South Dakota in Wollman vs. Gross is reported at: 484 F. Supp. 598.

The decision of the three-judge panel, Eighth Circuit Court of Appeals, is reported at 637 F. 2d 544.

The order (without opinion) denying rehearing dated April 9, 1981, with the dissenting opinion of four members of the court (per The Honorable Chief Judge Lay) is as yet unreported and is reproduced in the appendix at page 72 thereof.

GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

(i) This petition prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Eighth Circuit entered and filed December 31, 1980.

(ii) Rehearing was denied by an order entered and filed April 9, 1981.

(iii) No cross petition for writ of certiorari has been filed under Rule 19.5 as of this time.

(iv) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. 1254.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS WHICH THE INSTANT CASE INVOLVES ARE CITED AS FOLLOWS:

A. 28 U.S.C. 1346(b)

B. 28 U.S.C. 2401

C. 28 U.S.C. 2671

D. 28 U.S.C. 2675

E. 28 U.S.C. 2679

F. 28 C.F.R. 15.1(a)

G. A.S.C.S. Regulations (11-19 inclusive) Re: Accidents

The provisions involved herein are lengthy. Their citation alone is provided at this point, and the pertinent text is set forth in the appendix required by Supreme Court Rule 21 (1) (k).

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY (SHOWING JURISDICTION IN DISTRICT COURT)

This action was commenced in state court by the service of summons upon Jake Gross, Jr., on January 29, 1979. The defendant answered through Timothy J. Nimick, Sioux Falls, South Dakota, on the 16th day of February, 1979, and again in an amended answer (alleging in essence for the first time The Federal Driver's Act as a defense) on February 21, 1979.

On March 23, 1979, the U.S. Attorney filed and served an F.T.C.A. petition for removal pursuant to 28 U.S.C. 1346(b), which vests jurisdiction in the district court. On March 29, 1979, the United States Attorney also filed and served a motion to dismiss the action for failure of the plaintiff to first present an administrative claim before filing the

action. On July 16, 1979, the plaintiff filed a Federal Tort Claim letter with the United States Department of Agriculture. On July 18, 1979, the plaintiff filed a motion to remand the case to state court.

A hearing on all issues was heard by the District Court, The Honorable Fred J. Nichol presiding, on August 29, 1979. The decision of The Honorable Fred J. Nichol was rendered on February 20, 1980, and the District Court's order denying plaintiff's motion to remand and granting the government's motion to dismiss was entered on February 21, 1980.

Notice of the appeal with undertaking was filed and served on March 31, 1980. Thereafter, the matter was briefed and argued to the Eighth Circuit Court of Appeals, which rendered its decision affirming the District Court's order dated February 21, 1980. Petition for rehearing, with

the suggestion that the matter be reheard en banc, was filed on January 20, 1981. The petition was denied on April 9, 1981, by an equally divided court, The Honorable Chief Judge Lay dissenting, joined by The Honorable Judges Bright, McMillian and Arnold.

II. FACTS:

The plaintiff and defendant were both farmers living on farmsteads 1 1/4 miles apart in Hutchinson County, South Dakota, and had known each other for many years. The plaintiff had worked for the county A.S.C.S. office as a crop appraiser on a piecework basis, and the defendant had overseen his work.

On the day of the accident the defendant had gone to Mitchell, South Dakota, in line with his duties as district director. He had completed all of

his duties by approximately 3:00 o'clock p.m. He then got into his automobile and drove towards his home. The trip to and from Mitchell was part of the itinerary he planned for himself. The defendant had been completely done with all of his duties for approximately one hour prior to the accident.

At approximately a few minutes before 4:00 o'clock p.m. on Friday, June 11, 1976, at a point approximately one-half mile from the defendant's farmstead on County Road 13, Hutchinson County, South Dakota, the eastbound defendant negligently drove his automobile across the center line, causing it to collide with the westbound vehicle owned and driven by the plaintiff. The defendant was driving towards his farmstead in his own vehicle, which had private license plates thereon and which was insured by the defendant's private in-

surance carrier.

The plaintiff's automobile was totaled, and the defendant sustained permanent bodily injuries of a whiplash variety.

The defendant turned the matter of the accident over to his private insurance company for defense. He did not report the accident to the state A.S.C.A. office, nor did he follow any of the procedures required for reporting an accident which occurs within the scope of employment as required by 28 C.F.R. 15.1 and by his departmental regulations (see appendix, page 93). No mention was made of the fact that defendant was working at the time of the accident in a federal capacity (until defendant filed his amended answer in the state court lawsuit). As a result, the defendant's insurance company negotiated with the plaintiff from June 21, 1976,

until liability was denied (not on grounds of the Tort Claims Act) on January 4, 1979, shortly after which time the state court action was commenced. The negotiations consisted of the exchange of medical information as it was acquired and the rendering of correspondence by the insurance company on several occasions in representation of its insured, the defendant, Jake Gross, Jr. The state court action was commenced more than two years after the accident, and within the three-year state statute of limitations in South Dakota for negligence actions.

That until approximately the time of the service of the amended answer by Attorney Timothy J. Nimick, the lawyer hired by the insurance company to defend the defendant, neither the defendant's insurance company nor Mr. Nimick had any idea that the defendant at the time of the ac-

cident might have been a federal employee working within the scope of his employment. The plaintiff and his counsel were allowed by the defendant to deal exclusively with the insurance company.

The facts of the defendant's employment and the use of his automobile are as follows: That the defendant did not work in the state Agricultural Stabilization and Conservation Service (A.S.C.S.) office in Huron, South Dakota, but was, instead, the district director for the A.S.C.S. office, in charge of the supervision and review of programs for ten county offices within the State of South Dakota. His duty station had recently been changed to his home in rural Freeman, South Dakota. He was authorized, but not required, to use his own private vehicle for checking up on the various county offices. He could have taken any mode of

transportation he chose in the administration of his duties. He planned his own itinerary two weeks in advance. No one controlled him in the details of his work. The position of the district supervisor, which is essentially a co-ordinator between the county A.S.C.S. offices and the state office had never before been adjudicated as one of a federal employee for F.T.C.A. purposes. Subordinates to that office have been found not to be federal employees while superiors to that office were federal employees.

The prosecution of the lawsuit involved little difficulty by way of liability, but substantial difficulty in the diagnosis and prognosis of the nature and extent of plaintiff's bodily injuries; further, that plaintiff's counsel in attempting to adequately diagnosis plaintiff's condition for purposes of computing

a sum certain so that the case might be settled or litigated, sent the plaintiff to numerous physicians, receiving from the last physician, Dr. Koob, a neurologist, a written report dated July 26, 1978 (which is more than two years after the date of the accident).

The United States Department of Agriculture never responded to the letter of Administrative Claim filed on July 16, 1979.

REASONS FOR GRANTING THE WRIT

1. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN ITS DECISION IN THE INSTANT CASE HAS DIRECTLY CONFLICTED WITH KELLEY VS.THE UNITED STATES 568 F.2d 259, (2d Cir. 1978) ON EXACTLY THE SAME ISSUE.

This fact formed the basis of the dissent of the Honorable Arlin M. Adams to the panel opinion and the dissent of the Honorable Judges Lay, Bright, McMillian, and Arnold in the dissent (authored by Chief Judge Lay) to the denial of the Petition for Rehearing en banc.*

*Judge Adams being a visiting Judge for the Third Circuit who sat on the panel by designation did not have a vote on the question of whether or not to grant a Petition for Rehearing in the instant case. We, therefore, have the anomaly that by the luck of the draw the Petitioner has lost this case at the Court of Appeals level even though five of the nine Court of Appeals Judges who considered the case were obviously of the opinion that the Petitioner's cause was meritorious.

Kelley stands essentially for two propositions. First that the filing of a suit against an individual employee in State Court should satisfy the exhaustion requirement under the FTCA. Second, that blameless ignorance on the part of a reasonably diligent plaintiff is a sufficient reason to postpone the accrual of the FTCA Statute of Limitations. The latter proposition will be discussed in Part 2 hereof.

Concerning the exhaustion requirement, Judge Lay in his dissent to the denial of the rehearing in the instant case, referred to Meeker vs. United States 435 F.2d 1219 (8th Cir. 1970) and its progeny. Meeker (upon which the instant case is based) is also diametrically opposed to Kelley. Judge Lay stated in his dissent in the instant case:

> "I sense that the analysis in Kelley demonstrates that Meeker (an opinion in which I participated) was wrongly decided. The filing of the suit against the individual employee in State Court should satisfy the

exhaustion requirement under the FTCA."

In quoting Kelley, supra., at 568 F.2d, 267-68, Judge Lay referred to 28 U.S.C. §2679(b), which provides for removal of a suit to the Federal Court and recited:

> "It is far truer to the language to read it as implying that the removed case is to continue to judgment on the merits as a tort case against the United States subject only to one condition: that it is not found on pre-trial motion that the employee was acting beyond the scope of his employment... in which case the case is remanded."

Judge Lay stressed that since 28 U.S.C. §2679(e) and 28 C.F.R. §15.1 assure the prompt presentation of lawsuit papers to the appropriate officers of the government that no good reason exists for not considering the service of a complaint to be an adequate claim making procedure.

With the Second Circuit, one-half of the Eighth Circuit, and one visiting Judge (Adams) being strongly convinced that Kelly demands a reversal of the instant case the petitioner believes himself to be in

good company in requesting that his Petition for Writ of Certiorari be granted. The question should be answered once and for all.

2. THE DECISION IN THE INSTANT CASE IS IN CONFLICT WITH KELLEY, SUPRA., (SECOND CIRCUIT), UNITED STATES VS. LEPATOUREL, 593 F.2d 827 (8th Cir. 1979) (en banc) AND UNITED STATES VS. KUBRICK 444 U.S. 111 (1979).

Judge Adams and Judge Lay in their aforementioned dissents amply pointed out how the panel decision has misapplied the principles of Kubrick. Kubrick, when reduced to its simplest terms stands merely for the proposition that "ignorance of the law is no excuse". Kubrick also implies that ignorance of the "critical facts" will be an excuse (which will postpone accrual of an FTCA Cause of Action) if the plaintiff has been reasonably diligent.

In Kubrick the plaintiff knew everything he could possibly want to know

about the "facts" of his injury. Still he did nothing about pursuing his legal remedies.* It was obvious to Kubrick that the doctors were working within the scope of their employment in the VA Hospital and Kubrick, therefore, was not under the disadvantage which accrued to the plaintiff in the instant case.

In the instant case it was not "ignorance of the law" which was the problem but it was ignorance of the critical fact that the defendant was at the time of his accident working within the scope of his employment as a federal employee. Indeed, the defendant did not assume that stance until after he was sued and had initially answered the lawsuit through the lawyer appointed by his private insurance company.

*Kubrick did, however, pursue Veteran's Benefits during the period of time he should perhaps have been pursuing his FTCA claim as well. He recovered $50,000.00 from his Veteran's Benefits.

The private insurance company even paid for the damage to the plaintiff's vehicle which it obviously did not have to do under the Federal Tort Claims Act.

In many cases, under different facts than are here present, a plaintiff who knows a defendant's place of employment might be reasonably expected to uncover the fact that the defendant was or was not working at the time of the accident. Here, however, because the defendant's conduct lulled the plaintiff into a false sense of security (that the defendant was acting in a private capacity) this plaintiff could not reasonably be expected to uncover that fact (other than perhaps through luck as opposed to diligence.) As Judge Lay stated in his aforementioned dissent:

> "Wollman, injured in a car accident by Gross, diligently pursued his claim with Gross' insurer, which immediately reimbursed Wollman for damages to his car. ...Wollman was literally lulled into a false sense of security by Gross and his insurer who negotiated his claim with him, perhaps in good faith for over two years.

Gross and his insurer, not Wollman were the ones who slept on their rights. Gross and his insurer did not report the accident to the government or deliver Wollman's claim to the government as required... ."

Therefore, the instant case, unlike Kubrick, is a "blameless ignorance of a critical fact" case and the correct application of Kubrick would result in the postponing of the accrual of the plaintiff's Cause of Action until the plaintiff learned or reasonably should have learned of the "critical fact" that the defendant was working within the scope of his federal employment at the time of the accident.

It is extremely important to remember that the Supreme Court in Kubrick did not designate the accrual of Kubrick's Cause of Action as being the time of his injury (1968), but rather it designated that the accrual occured in 1969 when Kubrick first learned the last unknown critical fact that neomycin caused his injury. Under the

panel decision's misapplication of Kubrick, Kubrick's Cause of Action would have accrued in 1968 at the time of the injury rather than in 1969 when he learned the critical facts which were important to his particular lawsuit.

As pointed out by Judge Lay the instant case even contravenes the en banc decision of LePatourel, supra.(8th Cir. 1979). The plaintiff in that case did not bring suit for almost six years but diligently pursued his remedies. Judge Lay stated:

> "I cannot accept the distinction the panel makes of LePatourel from the facts existing here. ...there is no compelling reason why we should not reach the same result as in LePatourel."

In sum on this point, the Courts of Appeals of at least the Eighth and Second Circuits are diametrically opposed on this point and this exact question, while not having been directly answered by a United States Supreme Court case contravenes the correct application of the Kubrick case, such

that a clarification of the principles of Kubrick has become necessary to clear up the confusion.

3. THE UNITED STATES HAS WAIVED THE STATUTE OF LIMITATIONS OBJECTION IN THE INSTANT CASE.

Judge Lay pointed out in his dissent that while the Statute of Limitations is ordinarily not subject to being tolled or subject to estoppel it may be waived. Judge Lay stated:

> "It is the United States that has intervened in the State Court, substituting itself in place of the individual employee. When it does so, at a date past the time of the (FTCA) Statute of Limitations, it seems that a realistic interpretation of sub-sections (28 U.S.C.) 2679 (b) and (d) would require the government to take the original suit as it finds it; the original suit should be deemed to have been initiated against the United States for purposes of determining whether it was brought within the proper Statute of Limitations. (Emphasis added)."

CONCLUSION

In conclusion on the foregoing points it is worthy of note that this entire

injustice resulted from the fact that a letter of claim was transmitted to the Department of Agriculture on July 18, 1979 instead of on June 11, 1978. No prejudice whatsoever from the delay accrued to the government. More importantly, once the government had received the letter of claim nothing happened. The letter was never responded to. It would be, indeed, a gross injustice if this diligent plaintiff were deprived of his day in court as the result of such a meaningless omission. That the real question in this case is whether rhetoric will be allowed to put government out of the reach of its people by imposing upon its citizens a standard which very few people would be able to meet and compliance with which would depend upon the greatest of luck.

For these reasons a Writ of Certiorari should issue to review the

judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted on this 3rd day of July, 1981.

John N. Gridley, III
101 S. Main
Suite 402
Sioux Falls, SD 57102
Counsel for the Petitioner

N. Dean Nasser, Jr.
101 S. Main
Suite 404
Sioux Falls, SD 57102
Counsel for the Petitioner